Soon Lee Huat Palm Oil Mill Sdn Bhd v Stable-Win Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–371 OF 2011
MOHD HISHAMUDIN, SYED HELMY JJCA AND ZAWAWI SALLEH J
29 MARCH 2013

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Civil Procedure — Appeal — Fact, finding of — Parties entered into lease agreement — Action for termination of lease agreement against defendant for not possessing milling license allowed — Mill surrendered to plaintiff — Appeal against decision — Whether plaintiff could still retain license issued by Malaysian Palm Oil Board — Unawareness that no license could be issued concurrently to two different companies to operate same mill — Whether lease agreement null and void by reason of s 21 of the Contracts Act 1950 — Whether trial judge erred — Malaysian Palm Oil Board Act 1998 — Malaysian Palm Oil Board (Licensing) Regulations 2005

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This was an appeal against the decision of the learned judicial commissioner ('JC') in granting the respondent's ('the plaintiff') application for a declaration that a lease agreement entered into between the plaintiff and the appellant ('the defendant') was null and void by reason of a mutual mistake of fact; and for an order that the defendant surrenders the palm oil mill to the plaintiff. Briefly the facts were that Ecofuture Bhd ('EB'), owned 100% shares in the plaintiff's company, Stable-Win Sdn Bhd. One Yeo Kim Luang ('Yeo') was a common director and shareholder of both EB and the plaintiff. EB owned a palm oil mill ('the mill') and a milling license to operate the mill. Both EB and the plaintiff were not in a financial position to operate the mill for two years prior and the mill was operating under capacity and was in a dilapidated condition. The defendant took on a lease of the mill entered into a lease agreement with the plaintiff, incurring a sum of RM3,134,497.94 for repair and upgrading works to the mill. The Malaysian Palm Oil Board ('MPOB') granted a temporary milling license to the defendant but this was objected by the plaintiff. The MPOB then requested the parties to discuss and settle the matter, before a fresh license was issued to the defendant. The MPOB notified the plaintiff that a fresh milling license could only be issued to the defendant upon the cancellation of the existing milling license issued to the plaintiff. The MPOB also informed the plaintiff that the existing license issued to the plaintiff could not be maintained. The plaintiff agreed to surrender its existing milling license. The plaintiff issued a notice of termination of the lease agreement. However, the MPOB rejected the defendant's application for a fresh license. The defendant, commenced an action against both EB and the plaintiff in respect of the lease agreement and the purchase of shares in the plaintiff. However, subsequently, it withdrew the originating summons action. Instead, the

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A defendant then filed a writ action against EB, the plaintiff and Yeo Kim Luang at the High Court. The plaintiff, on the other hand, commenced an action against the defendant alleging that the defendant did not possess a milling license to operate the said mill and thus the lease agreement was null and void. The plaintiff's action was allowed. The mill was surrendered to the plaintiff.
B The issues that arose for the court's determination were whether there was a mutual mistake of fact in that both the parties were under the mistaken belief that the plaintiff could still retain the license issued by the MPOB, notwithstanding cl 3.17 of the lease agreement and that the parties were unaware that under the Malaysian Palm Oil Board Act 1998 and the Malaysian
C Palm Oil Board (Licensing) Regulations 2005, no license could be issued concurrently to two different companies to operate the same mill; and whether the lease agreement was null and void by reason of s 21 of the Contracts Act 1950.

D **Held**, allowing the appeal:

(1) The learned JC fell into error when she held that the parties were under a mutual mistake of fact in thinking that the plaintiff could still retain its existing license, whilst the defendant applied for a license from the
E MPOB to operate the same mill. On the evidence before the court, the issue of mutual mistake did not arise at all. In the instant case, the lease agreement clearly provided that the defendant was required to apply and obtain the license to carry on the operation of the mill (see para 8).

(2) Implicit in the material clause was the requirement for the plaintiff to
F surrender its existing license to the MPOB; as only one milling license would be issued in respect of a mill. Since the plaintiff had leased the mill to the defendant and ceased milling activity, the plaintiff's existing license must be surrendered in order for a fresh license to be issued to the defendant (see para 10).

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(3) On a plain reading of cl 3.17 of the leased agreement, it was clear that the lessor (the plaintiff) was to grant the lessee (the defendant) the right to operate the mill. As the plaintiff's milling license was not transferable or assignable to the defendant to operate the mill, it would thus be
H obligatory for the plaintiff to surrender its existing license to the MPOB, and for the MPOB to issue a fresh milling license to the defendant. This would give effect to the leased agreement (see para 19).

(4) If the court were to accept the contention of plaintiff that both parties to the lease agreement entered into it under some misunderstanding or
I misapprehension as to the requirement of the mandatory compliance of the MPOB Act and the MPOB Regulations 2005, that no license could be issued simultaneously to two different companies to operate the same mill, then there was no doubt that the mistake was one of law and not one of fact (see para 25).

(5) The defendant was therefore entitled to its rights under the lease agreement and the possession of the mill. In the circumstances of the case and pursuant to an oral application by learned counsel for the defendant, in the exercise of the court's powers under s 64(4) of the Courts of Judicature Act 1964, the lease agreement was extended for a further term of three years (see para 29).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan pesuruhjaya kehakiman yang bijaksana ('PK') yang telah membenarkan permohonan responden ('plaintif tersebut') untuk deklarasi bahawa perjanjian pajakan yang dimeterai antara plaintif dan perayu ('defendan tersebut') adalah terbatal dan tidak sah dengan sebab kesilapan fakta bersama; dan untuk perintah bahawa defendan menyerahkan kilang minyak kelapa sawit kepada plaintif. Secara ringkas fakta-fakta adalah bahawa Ecofuture Bhd ('EB'), memiliki 100% saham-saham di dalam syarikat plaintif, Stable-Win Sdn Bhd. Yeo Kim Luang ('Yeo') merupakan pengarah am dan pemegang saham kedua-dua EB dan plaintif. EB memiliki kilang minyak kelapa sawit ('kilang tersebut') dan lesen pengilangan untuk mengusahakan kilang tersebut. Kedua-dua EB dan plaintif tidak berada di dalam posisi kewangan untuk mengusahakan kilang untuk dua tahun sebelumnya dan kilang tersebut diusahakan di bawah kapasiti dan berada dalam keadaan yang uzur. Defendan telah mengambil pajakan kilang, memeterai perjanjian pajakan dengan plainitif, menanggung jumlah RM3,134,497.94 untuk kerja-kerja membaiki dan menaik taraf kilang tersebut. Lembaga Minyak Kelapa Sawit Malaysia ('LMKSM') telah memberikan lesen pengilangan sementara kepada defendan tetapi ianya telah dibantah oleh plaintif. LMKSM kemudian telah meminta pihak-pihak untuk berbincang dan menyelesaikan perkara tersebut, sebelum lesen baru dikeluarkan oleh defendan. LMKSM telah memaklumkan kepada plaintif bahawa lesen pengilangan baru hanya akan dikeluarkan kepada defendan selepas lesen pengilangan yang dikeluarkan kepada plaintif dibatalkan. LMKSM juga memaklumkan plaintif bahawa lesen yang wujud yang dikeluarkan kepada plaintif tidak boleh dikekalkan. Plaintif bersetuju untuk menyerahkan lesen pengilangan yang wujud. Plaintif telah mengeluarkan notis pembatalan perjanjian pajakan tersebut. Walau bagaimanapun, LMKSM telah menolak permohonan defendan untuk lesen yang baru. Defendan memulakan tindakan terhadap kedua-dua EB dan plaintif berkenaan dengan perjanjian pajakan dan pembelian saham-saham di dalam plaintif. Walau bagaimanapun, selanjutnya, ia menarik balik tindakan saman pemula. Sebaliknya, defendan kemudian memfailkan tindakan writ terhadap EB, plaintif dan Yeo Kim Luang di Mahkamah Tinggi. Plaintif, sebaliknya, memulakan tindakan terhadap defendan mendakwa bahawa defendan tidak mempunyai lesen pengilangan untuk mengusahakan kilang tersebut dan justeru perjanjian pajakan adalah terbatal dan tidak sah. Tindakan plaintif telah dibenarkan. Kilang tersebut telah diserahkan kepada plaintif. Isu yang timbul untuk penentuan mahkamah

adalah sama ada terdapat kesilapan fakta bersama iaitu bahawa pihak-pihak mempunyai tanggapan yang salah bahawa plaintif masih boleh mendapatkan lesen yang dikeluarkan oleh LMKSM, meskipun klausa 3.17 perjanjian pajakan dan bahawa pihak-pihak tidak tahu bahawa di bawah Akta Lembaga Minyak Kelapa Sawit Malaysia 1998 dan Peraturan Lembaga (Pelesenan) Minyak Kelapa Sawit Malaysia 2005, tiada lesen boleh dikeluarkan secara serentak kepada dua syarikat yang berbeza yang mana mengusahakan kilang yang sama; dan sama ada perjanjian pajakan adalah terbatal dan tidak sah disebabkan s 21 Akta Kontrak 1950.

Diputuskan, membenarkan rayuan:

(1) PK yang bijaksana telah terkhilaf apabila beliau memutuskan bahawa pihak-pihak berada di bawah kesilapan fakta dalam memikirkan bersama bahawa plaintif masih boleh mengekalkan lesennya yang sedia ada, manakala defendan telah memohon untuk lesen daripada LMKSM untuk mengusahakan kilang yang sama. Berdasarkan keterangan di hadapan mahkamah, isu kesilapan bersama tidak timbul langsung. Dalam kes ini, perjanjian pajakan dengan jelas memperuntukkan bahawa defendan perlu memohon dan memperoleh lesen untuk menjalankan pengendalian kilang tersebut (lihat perenggan 8).

(2) Adalah mutlak di dalam klausa material tentang keperluan plaintif untuk menyerahkan lesen yang wujud kepada LMKSM; memandangkan hanya satu lesen pengilangan boleh dikeluarkan berkenaan dengan sebuah kilang. Memandangkan plaintif telah memajak kilang tersebut kepada defendan dan berhenti menjalankan aktiviti pengilangan, lesen plaintif yang wujud hendaklah diserahkan supaya lesen yang baru boleh dikeluarkan kepada defendan (lihat perenggan 10).

(3) Jika klausa 3.17 perjanjian pajakan dibaca dengan ringkas, adalah jelas bahawa pemberi pajak (plaintif) hendaklah memberikan pemajak (defendan) hak untuk mengendalikan kilang. Memandangkan lesen pengilangan plaintif tidak boleh dipindah milik atau diserahkan kepada defendan untuk mengendalikan kilang tersebut, justeru adalah wajib untuk plaintif menyerahkan lesen yang wujud kepada LMKSM, dan untuk LMKSM mengeluarkan lesen pengilangan yang baru kepada defendan. Ia akan memberi efek terhadap perjanjian pajakan tersebut (lihat perenggan 19).

(4) Sekiranya mahkamah menerima hujahan plaintif bahawa kedua-dua pihak kepada perjanjian pajakan memeterai perjanjian tersebut atas dasar salah sangka atau salah tanggapan mengenai keperluan untuk mematuhi Akta LMKSM dan Peraturan LMKSM 2005 yang mandatori, bahawa tiada lesen boleh dikeluarkan secara berturut-turut kepada dua syarikat

berbeza yang mengendalikan kilang yang sama, justeru adalah tidak diragui bahawa kesilapan tersebut adalah kesilapan undang-undang dan bukan fakta (lihat perenggan 25).

(5) Defendan oleh itu berhak kepada haknya di bawah perjanjian pajakan tersebut dan pemilikan kilang tersebut. Dalam keadaan kes dan berikutan permohonan lisan oleh peguam yang bijaksana untuk defendan, dalam menjalankan kuasa mahkamah di bawah s 64(4) Akta Mahkamah Kehakiman 1964, perjanjian pajakan dilanjutkan untuk tempoh lanjut selama tiga tahun (lihat perenggan).]

Notes

For cases on fact, finding of, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1169–1173.

Cases referred to

M Pakiam v YP Devathanjam [1952] 1 MLJ 58, CA (refd)
Sheikh Brothers Ltd v Ochsner [1957] AC 136, PC (refd)

Legislation referred to

Contracts Act 1950 ss 21, 22
Courts of Judicature Act 1964 s 64(4)
Malaysian Palm Oil Board (Licensing) Regulations 2005 reg 15
Malaysian Palm Oil Board Act 1998

Appeal from: Originating Summons No 24(L)-968 of 2010 (High Court, Muar)

Joseph Iruthayam (Siti Khadijah bt Zainal Rashid and Sivanesan Ramasamy with him) (Joseph Iruthayam & Co) for the appellant.
Parthiban a/l MN Letchumanan (Noor Liana Hashim with him) (Kuan & Company) for the respondent.

Zawawi Salleh J (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned judicial commissioner of the High Court of Malaya at Muar, Johor, delivered on 7 February 2011, granting the respondent/plaintiff's application for a declaration that a lease agreement dated 17 April 2009 entered into between the respondent/plaintiff and the appellant/defendant is null and void by reason

of a mutual mistake of fact; and for an order that the appellant/defendant surrenders the palm oil mill to the respondent/plaintiff within seven days from the date of the order.

[2] We have unanimously allowed the appeal with costs fixed at RM15,000.

[3] We now give our reasons.

[4] For ease of reference, we will be referring to the parties as they were at trial below, that is to say, as the plaintiff and defendant, as the case may be.

THE FACTS

[5] The facts of the case can be summarised as follows:

(a) Ecofuture Bhd ('EB'), a public listed company, owns 100% shares in the plaintiff company, Stable-Win Sdn Bhd. One Yeo Kim Luang is a common director and shareholder of both EB and the plaintiff;

(b) EB owned a palm oil mill ('the mill') at Labis Road, Segamat, Johor, and a milling licence to operate the mill. Both EB and the plaintiff were not in a financial position to operate the mill for two years prior to April 2009; and the mill was operating undercapacity and was in a dilapidated state;

(c) Yeo Kim Luang invited the defendant to take on a lease of the mill and to operate the same. Subsequently, a lease agreement dated 17 April 2009 was entered into between the plaintiff and the defendant;

(d) the defendant incurred a sum of RM3,134,497.94 for repair and upgrading works to the mill;

(e) the Malaysian Palm Oil Board ('MPOB'), by a letter dated 17 July 2009 to the defendant, granted a temporary milling licence to the defendant;

(f) the plaintiff, by a letter dated 13 August 2009, objected to the issuance of the temporary licence to the defendant;

(g) in view of the objection by the plaintiff, the MPOB, vide a letter dated 28 August 2009, requested the parties to discuss and settle the matter amicably, before a fresh licence is issued to the defendant;

(h) the defendant, by a letter dated 23 December 2009 to the plaintiff, confirmed that, pursuant to a meeting held between the defendant, the MPOB and the plaintiff on 21 December 2009, it had given an assurance that upon the issuance of a fresh licence to the defendant, it will surrender the licence to the plaintiff once the lease agreement expires;

(i) the MPOB, by its letter dated 4 August 2009 to the plaintiff, notified that a fresh milling licence can only be issued to the defendant upon the cancellation of the existing milling licence issued to the plaintiff; and confirmed that Yeo Kim Luang will be appointing solicitors to review the lease agreement. The MPOB also informed the plaintiff that, in view of the lease agreement that was in force, the existing licence that is now issued to the plaintiff cannot be maintained;

(j) the plaintiff, by its letter dated 15 March 2010 to the MPOB, agreed to surrender its existing milling licence;

(k) on 27 July 2010, EB and the defendant entered into an agreement for the purchase of shares in the plaintiff company, wherein the defendant agreed to purchase the 100% shares of the plaintiff company together with the mill;

(l) the MPOB, by a letter dated 4 August 2009 to the plaintiff, notified the latter that the Malaysian Palm Oil Board (Licencing) Regulations 2005 ('the MPOB Regulations 2005') provides that no licence can be issued to two companies for the same premises. Therefore, a fresh milling licence to the defendant can only be issued upon the cancellation of the plaintiff's existing licence;

(m) the plaintiff's solicitors, Messrs KC Yap & Partners, by their letter dated 14 December 2010, issued a notice of termination of the lease agreement;

(n) the MPOB, by their letter of 15 December 2010, rejected the defendant's application for a fresh licence. However, in para 5 of the MPOB's letter, it indicated that a show cause would be issued to the plaintiff as to why the licence issued to the plaintiff should not be cancelled, suspended or renewed under reg 15 of the MPOB Regulations 2005;

(o) the defendant, on 20 December 2010, via Shah Alam Originating Summons No S-24–2914 of 2010 commenced an action against both EB and the plaintiff in respect of the lease agreement and the purchase of shares in the plaintiff. However, subsequently, it withdrew the originating summons action. Instead, the defendant then filed a writ action against EB, the plaintiff and Yeo Kim Luang at the KL High Court Commercial Division (and the trial is scheduled to be heard in March 2013);

(p) the plaintiff, on 21 December 2010, via Muar High Court Originating Summons No 24(L)-968 of 2010, commenced an action against the defendant alleging that the defendant did not possess a milling licence to operate the said mill and thus the lease agreement was null and void;

(q) on 7 February 2011, the learned judicial commissioner of the High Court at Muar, allowed the plaintiff's originating summons action, and granted a declaration that the lease agreement was null and void; and

ordered the defendant to surrender the mill to the plaintiff; and for the plaintiff to repay to the defendant all benefits conferred by the defendant to the plaintiff; and

(r) both the Muar High Court and the Court of Appeal dismissed the defendant's application for stay of execution of the order of the Muar High Court. The mill has since been surrendered to the plaintiff on 7 March 2011.

DECISION OF THE HIGH COURT

[6] The learned judicial commissioner declared that the lease agreement was null and void on the grounds of a mutual mistake. In her ruling, the learned judicial commissioner said:

> 10. I therefore find that there was a mutual mistake of fact in that both parties were under the misapprehension that the plaintiff could retain its licence whilst the defendant is required to apply and obtain a licence from the MPOB in order to operate the Mill under cl 3.17 of the lease agreement, whereas in fact the parties were unaware that under the MPOB Act 1998 and the MPOB (Licensing) Regulations 2005 (PU(A)516/2005) ('the Regulations') the MPOB is not able to issue more than once licence in respect of a particular mill. In view of s 21 of the Contracts Act, I find that the lease agreement is void as the issue of the licence under the lease agreement is an essential term of the lease agreement, without which the defendant cannot operate the mill.

ISSUE FOR DETERMINATION

[7] The main and important issue for determination by this court is whether the learned judicial commissioner erred in law and fact when she held that there was a mutual mistake of fact in that both the parties were under the mistaken belief that the plaintiff could still retain the licence issued by the MPOB, notwithstanding cl 3.17 of the lease agreement; and that the parties were unaware that under the Malaysian Palm Oil Board Act 1998 ('Act 582') and the Malaysian Palm Oil Board (Licencing) Regulations 2005 (PU(A)516/2005) no licence could be issued concurrently to two different companies to operate the same mill; and because of this mutual mistake, the lease agreement is null and void by reason of s 21 of the Contracts Act 1950.

DECISION OF THIS COURT

[8] With respect, we are of the opinion that the learned judicial commissioner fell into error when she held that the parties were under a mutual

mistake of fact in thinking that the plaintiff could still retain its existing licence, whilst the defendant applies for a licence from the MPOB to operate the same mill.

[9] In our judgment, based on the evidence before the court, the issue of mutual mistake does not arise at all. In the instant case, the lease agreement clearly provides that the defendant is required to apply and obtain the licence to carry on the operation of the mill. Clause 3.17 of the lease agreement reads as follows:

> 3.17 MPOB Licence
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> The Lessor shall grant to the Lessee the rights of operating the palm oil mill including all mining, buying and selling of fresh fruit bunches, palm kernel, crude palm oil and etc after signing the Lease Agreement.
>
> The Lessee shall apply for and obtain the MPOB licence in order to carry out trading activities in palm oil and oil palm business as soon as practicable.

[10] In our view, implicit in the above clause is the requirement for the plaintiff to surrender its existing licence to the MPOB; as only one milling licence will be issued in respect of a mill. Since the plaintiff has leased the mill to the defendant and ceased milling activity, the plaintiff's existing licence must be surrendered in order for a fresh licence to be issued to the defendant.

[11] There is evidence on record to show that the parties had mutually agreed that the plaintiff surrenders the existing licence to the MPOB to enable the defendant's application for a fresh milling licence to be approved; and the defendant's agreement to surrender the licence once the lease agreement expires. The terms were contained in a letter dated 15 March 2010, written after mutual agreement between the parties. A perusal of the letter will confirm that the parties had, at a meeting with the MPOB on 21 December 2009, reached an amicable agreement; and pursuant thereto the defendant had given an assurance to surrender the licence once the lease expired.

[12] The terms of the letter of 15 March 2010 were arrived at after the MPOB's letter of 4 August 2009. In their letter of 4 August, the MPOB notified the defendant that no two licences would be issued to two companies for the same premises. And the licence to the defendant could only be issued after the cancellation of the plaintiff's existing licence. The letter also notified the plaintiff that with the lease agreement being in force, the existing licence held by the plaintiff could not be maintained. This was confirmed by the plaintiff's solicitor's notice of termination dated 14 October 2010.

[13] In the light of the above scenario of the state of affairs between the

parties, we are of the opinion that the learned judicial commissioner erred in her finding that there was a mutual mistake of fact as between the parties pertaining to the milling licence.

[14] As far as a mistake of fact is concerned, the Malaysian courts, in the absence of any clear authority on this point, will tend to follow the common law principles (see *Sheikh Brothers Ltd v Ochsner* [1957] AC 136 (PC), *M Pakiam v YP Devathanjam* [1952] 1 MLJ 58 (CA).

[15] At common law, in order to have the courts declare a contract void because of common mistake, more is required than just establishing the making of any sort of common mistake. Khoury and Yamouni, in a book entitled *Understanding Contract Law* (6th Ed), chats wood, Australia: Lexisnexis Butterworths, 2007), when discussing of common mistake at common law, summarised the position in the following terms at p 268:

> The courts will not render a contract void on the ground of common mistake unless the common mistake involves a matter which is so fundamental to the contract that both parties regard it as a condition precedent to the existence of binding contract. Whether a common mistake is of that nature will, of course, depend upon the facts of the case. However, decided cases, suggest that to be fundamental, the common mistake must either:
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> - Relate to the very existence of the subject matter of the contract, or
> - Involve the sale of property to a person who already owns it.
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> By way of contrast, a common mistake as to the quality, nature or value of the subject matter is not sufficient.

[16] The English common law principle of mutual mistake is codified in s 21 of the Contracts Act 1950. Section 21 provides for a mistake made by both parties to an agreement. It reads:

> 21. Agreement void where both parties are under mistake as to matter of fact.
>
> Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

[17] Prof Dato' Seri Visu Sinnadurai, in his book entitled *Law of Contract*; (3rd Ed), had this say on the scope of s 21 of the Contracts Act 1950 at pp 303–304:

> For a mistake to be operative under section 21, it must be one 'essential to the agreement'. The circumstances under which a fact may be regarded as 'essential to an agreement' are not made clear by the Act. All the three illustrations to the said section only envisage situations of res extinct (non-existence of the subject matter of

the contract), or res sua. However, it is clear that section 21 is not restricted to such mistakes alone: see the Pricy Council case of *Sheikh Brothers Ltd v Ochsneer*, and the judgment of Gill J in *Tham Kong v Oh Hiam*. See also *M Pakiam v YP Devathanjam*.'

[18] On the facts of the instant case, we are of the opinion that there is no mutual mistake occurring between the parties to the lease agreement.

[19] On a plain reading of cl 3.17 of the leased agreement, it is clear that the lessor ('the plaintiff') was to grant the lessee ('the defendant') the right to operate the mill. As the plaintiff's milling licence is not transferable or assignable to the defendant to operate the mill, it would thus be obligatory for the plaintiff to surrender its existing licence to the MPOB, and for the MPOB to issue a fresh milling licence to the defendant. This would give effect to the leased agreement.

[20] Further, cl 3.4 of the leased agreement requires the defendant to comply with the legislation and regulations governing the palm oil mill; and the defendant had duly complied with the same.

[21] It is not in dispute that by a letter dated 13 August 2009, the plaintiff had objected to the defendant's application for the licence. In its letter, the plaintiff protested, 'At no time have we allowed you to apply to MPOB for any licence to operate our palm oil mill. We strongly object to your MPOB application'. It is obvious that the position taken by the plaintiff contradicts cl 3.17 of the lease agreement since as a matter of law the defendant would require a licence issued by the MPOB in order to operate the mill.

[22] In the circumstances of the case, what the defendant did was what was required to be done under cl 3.17 as lessee and under the MPOB Regulations 2005.

[23] There is also evidence that the plaintiff, by its letter of 15 March 2010, had agreed to surrender its existing licence to the MPOB to enable MPOB to issue a fresh licence to the defendant to operate the mill.

[24] This is not, however, the end of the matter. Learned counsel for the defendant further submitted that, in the circumstances of the instant case, even if there had been a mutual mistake, the mistake is only one of law and not one of fact. And where the mutual mistake is only as to the law then, by virtue of s 22 of the Contracts Act 1950, it is not voidable.

[25] In our judgment, there is merit in this submission. If we were to accept the contention of learned counsel for the plaintiff that both parties to the lease

agreement entered into it under some misunderstanding or misapprehension as to the requirement of the mandatory compliance of the MPOB Act and the MPOB Regulations 2005, that no licence can be issued simultaneously to two different companies to operate the same mill, then there is no doubt that the mistake is one of law and not one of fact.

[26] Now, s 22 of the Contracts Act 1950 provides as follows:

> 22. Effect of mistake as to law.
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> A contract is not voidable because it was caused by a mistake as to any law in force in Malaysia; but a mistake as to a law not in force in Malaysia has the same effect as a mistake of fact.
>
> ILLUSTATION
>
> A and B make a contract grounded on the erroneous belief that a particular debt is barred by limitation: the contract is not voidable.

[27] The difference between a mistake of fact and a mistake of law is very clear. To put it simply, mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed. Whereas, a mistake of law happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of the judgment, upon facts, and necessarily presupposes that the person forming it is in full possession of the facts (see *Black's Law Dictionary Free Online*, (2nd Ed)).

CONSEQUENTIAL ORDER OF THIS COURT

[28] Now, what had happened in the present case is that, consequent to the order of the learned judicial commissioner, the defendant had surrendered the mill to the plaintiff vide a writ of possession dated 2 March 2011, which was executed on 7 March 2011.

[29] As we have allowed the defendant's appeal, the defendant is therefore entitled to its rights under the lease agreement and the possession of the mill. In the circumstances of the case and pursuant to an oral application by learned counsel for the defendant, in the exercise of our powers under s 64(4) of the

Courts of Judicature Act 1964, we made an order that the lease agreement be extended for a further term of three years effective from 15 May 2012 and expiring on 14 May 2015.

Appeal allowed.

Reported by Afiq Mohamad Noor